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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CC Docket #96-8  


Request By ALTS For Clarification  
Of The Commission's Rules  
Regarding Reciprocal Compensation  
For Information Service Provider  
Traffic

CCB/CPD 97-30

COMMENTS OF THE UNITED STATES  
TELEPHONE ASSOCIATION AND MEMBER COMPANIES

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## **SUMMARY**

The Association for Local Telecommunications Services' ("ALTS") "expedited letter request" should be denied. ALTS erroneously construes the Commission's Access Reform Order exempting Internet traffic from access charges as a finding by the Commission that such traffic, by definition, is local and therefore subject to reciprocal compensation under the Local Interconnection Order. The Commission's Local Interconnection Order makes clear that reciprocal compensation applies to local traffic only. Moreover, in the Access Charge Order, the Commission ruled that calls to an information service provider ("ISP") would be exempt from interstate access charges, not that such traffic is intrastate local traffic subject to reciprocal compensation as ALTS postulates. Historically, the jurisdictional nature of communications traffic has been determined by its end-to-end configuration, not by the presence of intermediate local switching and or transport. Consistent with this precedent, enhanced and information services are defined as interstate traffic. Also, such traffic may be simultaneously interstate, international and intrastate and, therefore, jurisdictionally inseverable. Similarly, a Commission finding that reciprocal compensation is warranted for ISP traffic would subject such traffic to regulation by state commissions, which would be inconsistent with the recently announced national policy goal of maximizing the commercial benefits of electronic commerce.

The Commission should affirm that ISP traffic is interstate in nature and not subject to reciprocal compensation.

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**COMMENTS OF THE UNITED STATES  
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**I. INTRODUCTION**

On June 20, 1997, the Association for Local Telecommunications Services ("ALTS") requested an "expedited letter clarification" that "nothing in the Local Competition Order requires that calls to an Information Service Provider ("ISP") be handled differently than other local traffic is handled under current reciprocal compensation agreements in situations where local calls to ISPs are exchanged between ILECs and CLECs."<sup>1/</sup> On July 2, 1997, the Commission requested public comment on the ALTS Letter.<sup>2/</sup>

<sup>1/</sup> Letter from Richard J. Metzger, ALTS, to Regina M. Keeney, Chief, Common Carrier Bureau, FCC (June 20, 1997) ("ALTS Letter").

<sup>2/</sup> See FCC Public Notice, DA 97-1399 (rel. Jul. 2, 1997).

ALTS claims that an "expedited letter clarification" is appropriate because "the merits are clear."<sup>3/</sup> ALTS then spends eight single-spaced pages trying to justify its "clear" entitlement to the requested "clarification." As shown below, the only thing "clear" is that ALTS is clearly wrong. The Commission should reaffirm its policy that jurisdictionally interstate ISP traffic is not local traffic and thus is not subject to reciprocal compensation under Section 251 of the Act and the Commission's Local Interconnection Order.<sup>4/</sup>

## **II. THE ALTS LETTER'S LEGAL ARGUMENTS ARE WRONG**

ALTS phrases its request in a manner designed to downplay its attempt to ensure that the Commission take the unwise and dramatic step of declaring interstate access traffic to be local. ALTS begins its legal arguments by a selective and misleading quotation from ¶ 1033 of the Local Interconnection Order. ALTS quotes the first two sentences in which the Commission expresses its expectation that local transport and termination charges and access charges "should converge" over time. It deletes the next three sentences as follows:

We conclude, however, as a legal matter, that transport and termination of local traffic are different services than access service for long distance telecommunications. Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252(d)(2) while access charges for interstate long-distance traffic are governed by Sections 201 and 202 of the Act. The Act preserves the legal distinctions between charges

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<sup>3/</sup> ALTS Letter at 1.

<sup>4/</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996) ("Local Interconnection Order"). These comments are submitted without prejudice to the signatories' brief that issues involving reciprocal compensation for local calls under the Telecommunications Act are reserved to the states by Sections 2(b) and 252, 47 U.S.C. §§ 152(b) and 252.

for transport and termination of local traffic and interstate and intrastate charges for terminating long distance traffic.<sup>5/</sup>

In the next paragraph of the Local Interconnection Order, the Commission makes it abundantly clear that the reciprocal compensation rules do not apply to non-local traffic such as interexchange traffic.

1034. We conclude that Section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area as defined in the following paragraph. . . . We find that reciprocal compensation provisions of Section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.

The Commission has reiterated on numerous occasions that it has jurisdiction over traffic that is jurisdictionally interstate, including ISP traffic.<sup>6/</sup> The fact that the Commission granted enhanced service providers an exemption from interstate access charges for policy reasons does not change the jurisdictional nature of ISP traffic from interstate access traffic to local.<sup>7/</sup> Indeed, this traffic would, by definition, have to be an interstate access arrangement to which access charges would otherwise apply in order for the Commission to have jurisdiction to grant the exemption. The Commission's access charge exemption could not have changed the jurisdictional nature of ISP traffic from interstate access traffic to local traffic, as ALTS

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<sup>5/</sup> Id. at ¶ 1033.

<sup>6/</sup> See MTS and WATS Market Structure, 97 FCC 2d 682, 711-12 (1983); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 2 FCC Rcd 4305, 4306 (1987). See also, Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 4 FCC Rcd 3983, 3987 (1989).

<sup>7/</sup> See Access Charge Reform, Notice of Proposed Rulemaking Third Report and Order and Notice of Inquiry, CC Docket No. 96-262, FCC 96-488, ¶¶ 284-85, released December 24, 1996 ("Internet NOI").

appears to claim. If it did, the Commission would have no jurisdiction over such traffic, but it has already asserted such jurisdiction.<sup>8/</sup> ALTS, therefore, would base the jurisdictional nature of a service on the rate the Commission prescribes for that service, not on the nature of the service itself. This argument has no statutory or other legal support. ALTS further attempts to finesse this critical jurisdictional point by asserting that the LECs

deliberately confuse calls that are 'interexchange' for the purpose of the Commission's jurisdiction, with the entirely distinct category of calls that are 'interexchange' for the purpose of paying Part 69 access charges. The portion of the Local Competition Order relied upon by Bell Atlantic and NYNEX uses the latter meaning of 'interexchange,' not the former.<sup>9/</sup>

It is ALTS that is attempting to create confusion. There is no authority for the proposition that there are two separate meanings of the term "interexchange," as ALTS claims. If the Commission decides to eliminate (or, indeed, if it decides to continue) the access charge exemption in the Internet NOI, it will be able to do so because Internet traffic is access traffic that is jurisdictionally interstate and thus within the power of the Commission to apply (or exempt) Part 69 access charges. In any event, such a decision will have no impact on the jurisdictional nature of ISP traffic.<sup>10/</sup>

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<sup>8/</sup> 47 U.S.C. § 221(b).

<sup>9/</sup> ALTS Letter at 5.

<sup>10/</sup> The parties commenting on the Internet NOI, supra note 7, recognize the interstate nature of Internet traffic. See, e.g., USTA Reply Comments at 7; Ameritech Reply Comments at 10; BellSouth Reply Comments at 3; Cincinnati Bell Reply Comments at 5; GTE Reply Comments at 3; SBC Reply Comments at 40; See also, AT&T Comments at 29-30; CAIS Comments at 13; Internet Consumer Parties Comments at 15; IUC Comments at 6.

ALTS also asserts that "states do not have any authority over the rates or calling areas for any information services associated with local calls to ISPs."<sup>11/</sup> The regulation of ISPs is not the issue. What we are talking about is the regulation of transport services used by ISPs. It is the jurisdictional nature of ISP traffic as interstate access traffic that permits the Commission to exempt such traffic from access charges and prevents the states from regulating such traffic. It is precisely the same jurisdictional nature of ISP traffic that takes it outside the scope of Section 251.

Conceding that ISP traffic is jurisdictionally interstate, ALTS argues that the Commission should consider only that portion of the call that occurs within the local exchange.<sup>12/</sup> This Commission has repeatedly rejected such "two call" jurisdictional theories, both with regard to enhanced/information services and for telecommunications services.<sup>13/</sup> It is the end-to-end configuration of the call that determines its jurisdictional nature, not any intermediate switching and/or transport. Federal and state precedent employ an "end-to-end" analysis to determine the jurisdictional nature of the call. Under this analysis, calls to and from the Internet cannot be presumed to be intrastate, let alone local, as discussed in Section

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<sup>11/</sup> ALTS Letter at 6.

<sup>12/</sup> *Id.*

<sup>13/</sup> *See, e.g.*, Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619 (1992) ("Enhanced Service Declaratory Ruling"), *aff'd Georgia Public Service Commission v. FCC*, 5 F.3d 1499 (11th Cir. 1993). (Voice messages from other states and exchanges were stored in a local voice messaging processor. Even though the end user usually retrieved messages from that processor by placing a local call, the fact that the messages originated outside the state made such an end-to-end communication jurisdictionally interstate). *See also*, AT&T Communications Revisions to Tariff FCC No. 2 (800 ReadyLine Service), 2 FCC Rcd 78 (1986); Teleconnect Company v. Bell Telephone Company of Pennsylvania, 10 FCC Rcd 1626 (1995).



III below. Furthermore, the Commission does not, as ALTS alleges, require that "ISPs be treated as end users."<sup>14/</sup> Rather, the Commission ruled in the recent Access Charge Order only that "ISPs should remain classified as end users *for the purposes of the access charge system*,"<sup>15/</sup> i.e., that they be exempt from paying interstate access charges.

ALTS argues that the Commission did not base its decision in the Local Competition Order on the jurisdictional nature of ISP traffic, but rather "on the need to preserve existing access revenue flows."<sup>16/</sup> It cites ¶ 1043 of the Local Interconnection Order for the proposition that CMRS providers were entitled "to transport and termination agreements in order to insure this traffic would not be assessed access charges."<sup>17/</sup> However, ¶ 1043 itself relies upon the Commission's jurisdiction under Section 251(g) to *preserve* the current interstate access charge regime as the basis for its actions.<sup>18/</sup>

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<sup>14/</sup> ALTS Letter at 6.

<sup>15/</sup> See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report And Order, FCC 97-158 (rel. May 16, 1997) ("Access Charge Order") at ¶ 348 (emphasis added).

<sup>16/</sup> ALTS Letter at 5.

<sup>17/</sup> *Id.*

<sup>18/</sup> Furthermore, the Commission clearly grounded its rules regarding CMRS providers on the fact that such providers are federally licensed.

1036. On the other hand, in light of this Commission's exclusive authority to define the authorized license areas of wireless carriers, we will define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under Section 251(b)(5).

Local Competition Order at ¶ 1036.

Having failed to evade the fatal jurisdictional flaws in its arguments, ALTS falls back to undocumented allegations made "to the best of ALTS's knowledge"<sup>19/</sup> that

it would be unlawfully discriminatory for Bell Atlantic and NYNEX to treat the exchange of local calls to ISPs differently under their reciprocal compensation agreements with adjacent LECs than they do under their agreements with competitive LECs.<sup>20/</sup>

Clearly, the Commission cannot issue an "expedited letter clarification" to resolve allegations of unreasonable discrimination. Such a determination is dependent on the specific facts and legal analysis of a given case. ALTS has ample protection against unlawful discrimination under the Act, and can raise any objection that it may have in this regard in an appropriate proceeding.<sup>21/</sup>

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<sup>19/</sup> ALTS Letter at 7.

<sup>20/</sup> *Id.* at 8.

<sup>21/</sup> To the extent that any "preexisting agreements" between ILECs that pre-date the 1996 Act treat ISP traffic differently than do reciprocal compensation arrangements with CLECs, ALTS allegations of unreasonable discrimination still would be invalid. The Commission specifically recognized that "preexisting agreements were negotiated under very different circumstances, and may not provide a reasonable basis for interconnection agreements under the 1996 Act." Local Interconnection Order, ¶ 170. The Commission permitted parties to mutually renegotiate agreements, and asserted that once agreements between adjacent ILECs have been approved by a state commission, then these agreements would be available to other parties in accordance with Section 252(I). The deadline for filing such agreements with the state commissions was June 30, 1997. Therefore, any ALTS discrimination claim based on pre-Act contracts between adjacent ILECs is premature at best.

### III. INTERNET TRAFFIC CANNOT BE PRESUMED TO BE JURISDICTIONALLY INTRASTATE

ALTS studiously avoids any factual claims about the interstate or intrastate nature of calls to ISPs, particularly Internet traffic. The facts, the Commission's precedents, and policy considerations demonstrate that ISP traffic cannot be considered to be intrastate, as the ALTS Letter requests.

ISP traffic is jurisdictionally *sui generis*. A recent working paper from the Commission's Office of Plans and Policy ("OPP") recognizes that, unlike much voice traffic on the PSTN, Internet traffic "has no built-in jurisdictional divisions."<sup>22/</sup> The OPP staff points out that a single Internet access call may communicate with multiple destinations, crossing interstate and international boundaries. As the OPP staff notes,

[B]ecause the Internet is a dynamically routed, packet-switched network, only the origination point of an Internet connection can be identified with clarity. Users generally do not open Internet connections to "call" a discrete recipient, but access various Internet sites during the course of a single connection.

\* \* \*

One Internet 'call' may connect the user to information both across the street and on the other side of the world.<sup>23/</sup>

One Internet call can access sites in the same state, in other states, and in other countries not merely at different times during the transmission, but at one and the same time. The fact that a single Internet call may simultaneously be interstate, international, and intrastate makes it inseverable for jurisdictional purposes. In such situations, that traffic must be treated as

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<sup>22/</sup> See Kevin Werbach, Digital Tornado: The Internet and Telecommunications Policy, FCC, OPP Working Paper No. 29 (Mar. 1997) at 45 ("Digital Tornado").

<sup>23/</sup> Id.

interstate, based on the inseverability criteria of Louisiana Pub. Serv. Comm'n. v. FCC.<sup>24/</sup> In similar situations, calls have not been considered intrastate, let alone "local," as ALTS desires.<sup>25/</sup>

The OPP staff also notes that from a technical perspective, the Internet does not classify traffic according to jurisdictional categories:

Internet routers have also not been designed to record sufficient data about packets to support jurisdictional segregation of traffic.<sup>26/</sup>

When traffic is severable, the Commission and the states have performed jurisdictional allocations on data and voice traffic, such as that associated with ONA services and Feature Group A access services, that cannot be measured accurately.<sup>27/</sup> Frequently, this is done on the basis of factors derived from one-time studies. While it is at least conceivable for the Commission to perform such allocations for severable traffic, there is no basis for a broad finding that ISP traffic, which is not severable, is "local."

ALTS' claim that ISP access calls are "local" calls is not only unsupported but inconsistent with the need for a consistent national and international policy approach to the Internet. As the Administration recently recognized in its recent report on global electronic commerce, when government involvement in electronic commerce over the Internet is needed,

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<sup>24/</sup> 476 U.S. 355 (1986) at n.4.

<sup>25/</sup> Cf., Enhanced Service Declaratory Ruling, supra note 13.

<sup>26/</sup> Digital Tornado, supra note 22, at 45.

<sup>27/</sup> See, e.g., Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 8 FCC Rcd 3114, 3118 (1993); Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, 4 FCC Rcd 8448 (1989).

it should support a predictable, minimalist, consistent, and simple legal environment.<sup>28</sup> A Commission ruling that treats all ISP access calls as "local" would have the effect of ceding regulatory jurisdiction over such traffic to the states. The imposition of diverse state regulations on such traffic does not support the important policy goals outlined by the Administration.

#### IV. RECOMMENDATIONS AND CONCLUSION


The Commission should reaffirm that ISP traffic is interstate in nature, and therefore not subject to the reciprocal compensation obligations imposed on incumbent LECs under Section 251.

Respectfully submitted,

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<sup>28/</sup> See A Framework for Global Electronic Commerce, U.S. Government Report (rel. Jul. 1, 1997), <http://www.whitehouse.gov/WH/New/Commerce/read.html>, Principle 3.

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